IN THE

Supreme Court of the United States

October Term, A. D. 1942

No. 590

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CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, a corporation,

Petitioner,

vs.

AMELIA MULDOWNEY, as Special Administratrix of the Estate of HARRY MULDOWNEY, Deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Chicago, St. Paul, Minneapolis & Omaha Railway Company respectfully shows to this Honorable Court:

*Summary Statement of Matter Involved.

Respondent sued in the United States District Court, District of Minnesota, under the Federal Employers' Lia-

*Respondent's intestate will be referred to as "Muldowney". References are to folios and pages of the printed record.

bility Act (35 Stat. 65, 66, 36 Stat. 291, 53 Stat. 1404, 45 U. S. C. A. Secs. 51-59), to recover damages for Muldowney's death in the course of his employment as a switchman by petitioner while both parties were engaged in interstate transportation (ff. 5-8, pp. 4-7; f. 48, p. 34).

Whether petitioner violated the Safety Appliance Act relating to automatic couplers (27 Stat. 531, 45 U. S. C. A. Sec. 2), and if so, whether such violation proximately caused Muldowney's death were the only issues submitted to the jury (ff. 279-284, pp. 204-207).

On appeal from the judgment entered on a jury verdict for respondent (f. 293, pp. 213, 214; f. 304-318, pp. 223-238), the Circuit Court of Appeals for the Eighth Circuit held that there was substantial evidence requiring submission of both issues to the jury (ff. 243-255, pp. 243-253), and on October 26, 1942, affirmed the judgment of the District Court (f. 255, pp. 253, 254). Petition for rehearing, seasonably filed (ff. 255-266, pp. 255-265), was denied November 14, 1942 (f. 266, p. 265). Petitioner seeks review by certiorari of the judgment of affirmance.

There was no eyewitness to the accident and circumstantial evidence was relied on to establish negligence and proximate cause.

Facts.

When fatally injured on March 6, 1941, Muldowney was engaged in a switching operation which involved the coupling of a switch engine tender (Exhibits "D", "E" and "F", pp. 41, 45, 53), to a Swift & Company refrigerator car (Exhibit "B", p. 31, coupler knuckle open; Exhibit "C", p. 33, coupler knuckle closed), on the north bound

main track in petitioner's Sioux City, Iowa, Twenty-second Street Yard (ff. 66, 67, pp. 49, 50).

On Exhibit "A" (p. 15), camera facing north, the north bound main track is at the extreme right hand or east side, the yard office immediately adjacent to the east, and Twenty-second Street (L. S. 1, Ex. A) is 315 feet south of the yard office. L. S. 2 on Exhibit "A" indicates the location of the south end of the refrigerator car (the most southerly car of a string of twenty-one cars), and is the approximate point of accident (ff. 63-67, pp. 47-50; ff. 78, 79, pp. 58-59). After coupling the switch engine tender to the refrigerataor car, it was the intention to pull the twenty-one cars southerly on the north bound main track (f. 67, p. 50).

The switch engine, headed south with the tender to the north and the front and rear headlights burning, entered the north bound main track south of Twenty-second Street and, on Muldowney's signal, backed northerly to make the coupling (ff. 129-132, pp. 95, 96). No stop was made until after the accident (f. 133, pp. 97, 98). Muldowney, holding a lighted lantern, stood on the footboard at the northwest corner of the backing tender (Exhibit "F", p. 53). As the tender passed them Foreman Schupp, standing at the west side of the track 215 feet south of the yard office (L. S. 3, Exhibit "A", p. 15), and Yardmaster Stickels, facing south and standing at the west side of the track approximately 20 feet south of the refrigerator car, saw Muldowney in that position (ff. 131, 132, p. 96; ff. 69-79, pp. 51-59; Ex. D, L. S. 4, p. 41; ff. 23, 24, pp. 17, 18). It was dark and signals were being given by lighted lanterns (f. 130, p. 95).

Engineer Larson from his seat box at the west side of the engine cab kept a lookout ahead in the direction of movement. The movement and stopping of the switch engine was governed exclusively by signals from Muldowney (C. L. 1, Ex. E, p. 45; ff. 131-139, pp. 95-102). From a point approximately 120 feet south of the refrigerator car the speed of the engine and tender did not exceed two to three miles per hour (ff. 132, 133, p. 97). When the north end of the moving tender was eight to twelve feet from the refrigerator car, Muldowney, from his position on the tender footboard, gave the engineer a lantern signal which indicated that everything was in readiness to make the coupling and that the tender should continue back for that purpose (ff. 132-137, pp. 96-100). Larson complied with that signal and the tender backed against the standing car (f. 133, p. 97).

When the engine and cars did not start ahead, or south, as expected, Stickels looked back, or north, and saw Muldowney's lighted lantern on the ground between the rails. He then discovered Muldowney, standing upright, facing northerly, crushed between the closed coupler knuckles of the refrigerator car and tender. His body was to the east of the center of the car coupler (ff. 24-27, pp. 18-20). There was a light coating of fresh snow on the tender footboard but no marks to indicate that Muldowney had slipped therefrom (f. 28, p. 21).

Immediately after the accident both coupler knuckles were found closed and the tender coupler and drawbar were to the east of the center (f. 26, p. 19, ff. 40, 41, p. 30; f. 47, p. 34; ff. 142-144, pp. 104, 105). Two witnesses testified that the car drawbar was centered (ff. 143, 144, p. 105;

ff. 180, 181, pp. 132, 133). There is no evidence to the contrary.

Irrespective of the alignment of the coupler drawbars, with both coupler knuckles closed, a coupling cannot be made (f. 195, p. 143; f. 224, p. 165). If drawbars are not in line with each other and only one coupler knuckle is open the coupling ordinarily will not make, but if both ~~coupled~~ couplers knuckles are open the coupling usually will make, even though the drawbars are not in alignment (ff. 224-226, pp. 165, 166). To make a coupling it is not necessary to have both drawbars centered. If they are in line with each other, even though off center, the coupling will make (ff. 250, 251, p. 184). The switch engine and tender weighed approximately ninety tons, the refrigerator car weighed approximately thirteen and one half tons, and the car drawbar weighed three hundred fifty pounds (f. 245, p. 180; f. 210, p. 154; f. 261, p. 191).

There was no mechanical defect in either coupler apparatus, nor was any condition found that could cause excessive lateral play in the drawbar of either coupler (ff. 180-182, pp. 132, 133; ff. 192, 193, pp. 141, 142; ff. 197-201, pp. 145-148; ff. 204-210, pp. 150-154; ff. 216-218, pp. 159, 160; ff. 227-228, pp. 167, 168; ff. 232, 233, p. 171; ff. 244-246, pp. 179, 180). The normal lateral play of the car drawbar was three inches. The car coupler apparatus permitted the draw bar to move from a center position to either side, a distance of one and one-half inches. In the absence of this play, cars coupled together could not pass around curves without danger of derailment or injury to the cars, nor be coupled together on curved track (ff. 206, 207, p. 152).

The tank coupler drawbar was oiled and could be easily moved from side to side by hand. The refrigerator car drawbar was not oiled, and, because of exposure to the elements, had become rusted, and required greater effort to move from side to side (f. 246, p. 180; f. 250, p. 183). If necessary Muldowney could have moved the tender drawbar to either side without leaving the tender footboard (f. 246, p. 180; ff. 253, 254, p. 186).

Muldowney sustained crushing injuries in the abdomen and back, which could only have been caused by a terrific impact (ff. 103, 104, pp. 76, 77).

After the accident, when the car and tender were stationary and separated twenty feet, Foreman Schupp opened the car coupler knuckle and the tender was back northerly to make a coupling. On the first attempt the coupling did not make. The car and tender were then separated twenty feet, and, while stationary, Schupp shoved the car drawbar east to line it up with the tender drawbar and opened the tender coupler knuckle. With both knuckles open, the tender again was backed northerly and the coupling made automatically. In shoving or lifting the car drawbar east Schupp may have stood in front of the car coupler facing the car (ff. 88-92, pp. 65-68).

Respondent introduced opinion evidence to the effect that the presence of Muldowney's body between the couplers could not have forced the drawbars out of alignment, if they were in alignment prior to the accident. The opinion testimony (a) assumed that the car drawbar was east of center after the accident; (b) rejected the weight of the tender and car as a factor; and (c) made no assumption respecting whether or not the knuckles were open or closed prior to the accident (ff. 108-113, pp. 80-83). The locker

room, lunch room and toilet facilities for the switchmen were located in the yard office. To reach the yard office from his location on the footboard of the moving tender, it would have been necessary for Muldowney to pass in front of the car coupler (ff. 253-255, pp. 186, 187).

The Circuit Court of Appeals held that proof of the foregoing facts or circumstances justified jury inferences: (1) that immediately prior to the accident the drawbars were so far out of alignment as to prevent automatic coupling, unless a man went between the car and tender and moved the car drawbar east to effect alignment; (2) that as he approached the car on the footboard of the moving tender, Muldowney discovered this condition, and walked or ran ahead to lift or shove the car drawbar east to effect alignment, when he was struck by the coupler of the moving tender and crushed between the couplers (ff. 243-255, pp. 243-253).

In its opinion the Circuit Court of Appeals fails to mention or consider the material and uncontradicted evidence respecting the signal given by Muldowney when the moving tender was eight to twelve feet from the car and respecting his ability to shift the tender drawbar if necessary to effect alignment without leaving the tender footboard. These omissions were pointed out to that court in petitioner's application for rehearing (pp. 255-258).

Jurisdiction.

(1) This court has jurisdiction to review the decision and judgment of the Circuit Court of Appeals by virtue of (a) Section 240 of the Judicial Code as amended, 43 Stat. 938, 28 U. S. C. A. Sec. 347(a); and (b) the nature

of the case (a suit under the Federal Employers' Liability Act, 35 Stat. 65, 66, 36 Stat. 291, 53 Stat. 1404, 45 U. S. C. A. Secs. 51-59, based on an alleged violation of the Safety Appliance Act relating to automatic couplers. 27 Stat. 531, 45 U. S. C. A. Sec. 2) and the rulings below (ff. 263, 264, p. 193; ff. 287-288, p. 210; ff. 309, 310, pp. 227, 228; ff. 296-297, pp. 215, 216; f. 303, p. 223).

(2) The date of the judgment to be reviewed is October 26, 1942. Rehearing was denied November 14, 1942. The date of this application for certiorari will be shown by the Clerk's stamp on the cover hereof.

(3) Cases believed to sustain jurisdiction are:

Forsyth v. Hammond, 166 U. S. 506,

St. L. & Iron Mtn. Ry. v. McWhirter, 229 U. S. 265, 276, 277,

St. Louis-San Francisco Railway Co. v. Mills, 271 U. S. 344, 346,

Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333,

Gay v. Ruff, 292 U. S. 25.

Questions Presented.

(1) Was there substantial evidence which justified the jury in finding that petitioner violated the Safety Appliance Act relating to automatic couplers?

(2) Was there substantial evidence from which the jury could find that a violation of that Act was the proximate cause of death or does the evidence leave the cause of death in the realm of speculation and conjecture and is reversal required under the doctrine of *Chicago, M. & St. P. Ry. Co. v. Coogan,* 271 U. S. 472, and *Pennsylvania R. Co. v. Chamberlain,* 288 U. S. 333?

(3) In order to return a verdict for respondent was the jury required to draw inferences from inferences, base presumption on presumption, adopt inferences inconsistent with proven circumstances and enter the realm of speculation and conjecture, contrary to the rule of *United States v. Ross*, 92 U. S. 281, *Manning v. Insurance Co.*, 100 U. S. 693, *Chicago, M. & St. P. Ry. Co. v. Coogan*, 271 U. S. 472, and *Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333?

The decision of the Circuit Court of Appeals appears in the record on pages 242 to 253, inclusive.

Reasons Relied On For Allowance of Writ.

1. In holding that there was substantial evidence of negligence, the Circuit Court of Appeals decided a federal question of substance in a way in conflict with applicable decisions of this court.

Chicago, M. & St. P. R. Co. v. Coogan, 271 U. S. 472,
Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333,
Patton v. Texas & Pacific Ry. Co., 179 U. S. 658.

(2) In holding that there was substantial evidence of proximate cause, the Circuit Court of Appeals decided a federal question of substance in a way in conflict with applicable decisions of this court.

United States v. Ross, 92 U. S. 281,
Manning v. Insurance Co., 100 U. S. 693,
Chicago, M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472,
New York Cent. R. Co. v. Ambrose, 280 U. S. 486,
Atchison, T. & S. F. Ry. Co. v. Toops, 281 U. S. 351,
Atchison, T. & S. F. Ry. Co. v. Saxon, 284 U. S. 458,
Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333,
Northwestern Pac. Ry. Co. v. Bobo, 290 U. S. 499.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on its docket and that said decision and judgment of said Appellate Court be reversed by this Honorable Court and that petitioner may have such other and further relief in the premises as to this Honorable Court may seem just; and your petitioner will ever pray.

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AMELIA MULDOWNEY, as Special Administratrix of the Estate of HARRY MULDOWNEY, Deceased,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of Court Below.

The opinion of the Circuit Court of Appeals for the Eighth Circuit, "Chicago, St. Paul, Minneapolis & Omaha

Railway Company, Appellant, v. Amelia Muldowney, as Special Administratrix of the Estate of Harry Muldowney, Deceased, Appellee," was filed and judgment of affirmance entered October 26, 1942, and appear at Pages 242 to 254, inclusive of the record, and is reported in Volume 130 Federal (2d) on Page 971. Petition for rehearing (pp. 255-264) was denied November 14, 1942 (p. 265).

II.

Jurisdiction.

The basis upon which it is contended that this court has jurisdiction to review the decision and judgment of the Circuit Court of Appeals for the Eighth Circuit is fully stated under the heading "Jurisdiction" in the petition printed within this cover.

III.

Statement of the Case.

So far as pertinent to the questions presented for review, a statement of the case has been given under the heading "Summary Statement of Matter Involved" in the petition printed within this cover.

IV.

Specification of Errors.

(1) The Circuit Court of Appeals erred in holding that there was substantial evidence of negligence.

(2) The Circuit Court of Appeals erred in holding that there was substantial evidence of proximate cause.

V.

SUMMARY OF ARGUMENT.

No Substantial Evidence of Negligence or Proximate Cause.

(a) Test of liability under Federal Employers' Liability Act.

Safety Appliance Act, (27 Stat. 531, 45 U. S. C. A. Sec. 2),

Federal Employers' Liability Act, (35 Stat. 65, 66; 36 Stat. 291; 53 Stat. 1404; 45 U. S. C. A. 51-59),

Chicago, R. I. & Pac. Ry. v. Brown, 229 U. S. 317,

San Antonio Ry. v. Wagner, 241 U. S. 476,

Atlantic City R. R. Co. v. Parker, 242 U. S. 56,

Hampton v. Des Moines & Cent. I. R. Co., 65 Fed. (2d) 899 (C. C. A. 8),

Chicago, M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472,

Toledo, St. L. & W. R. Co. v. Allen, 276 U. S. 165, 168, 169,

Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 339-344,

United States v. Ross, 92 U. S. 281, 283, 284,

Manning v. Insurance Co., 100 U. S. 693, 697, 698,

Patton v. Texas & Pacific Ry. Co., 179 U. S. 658, 663, 664,

Gunning v. Cooley, 281 U. S. 90, 94, 95,

Ewing v. Goode, 78 Fed. 442, 444.

(b) No substantial evidence of violation of Safety Appliance Act.

Meisenhelder v. Byram, 182 Minn. 615, 617, 233 N. W. 849, 850,

United States v. Hill, 62 Fed. (2d) 1022, 1025, 1026, (C. C. A. 8).

(c) No substantial evidence of proximate cause. Evidence leaves cause of death in realm of speculation and conjecture.

Looney v. Metropolitan Railroad Co., 200 U. S. 480,

Miller v. Union Pac. R. Co., 290 U. S. 227,

Great Northern Ry. Co. v. Wiles, 240 U. S. 444,

Patton v. Texas & Pacific Ry. Co., 179 U. S. 658,

Chicago, M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472,

Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333,

Lowden v. Burke, 129 Fed. (2d) 767 (C. C. A. 8),

Geraghty v. Lehigh Valley R. Co., 70 Fed. (2d) 300, 83 Fed. (2d) 738, (C. C. A. 2),

Williamson v. St. Louis-San Francisco Ry. Co., 74 S. W. (2d) 583 (Mo.),

Atlantic Coast R. Co. v. Wimberley, 273 U. S. 673,

Gulf M. & N. R. Co. v. Wells, 275 U. S. 455,

Ft. Smith S. & R. I. R. Co. v. Moore, 276 U. S. 593,

Louisville & N. R. Co. v. Chatters, 279 U. S. 320, 332,

Northern Ry. Co. v. Page, 274 U. S. 65, 72,

Atchison, T. & S. F. Ry. Co. v. Toops, 281 U. S. 351, 354, 355,

Southern Ry. Co. v. Moore, 284 U. S. 581,

Atchison, T. & S. F. Ry. v. Saxon, 284 U. S. 458,

Southern Ry. Co. v. Walters, 284 U. S. 190, 194,

New York Cent. R. Co. v. Ambrose, 280 U. S. 486, 489, 490,

Northwestern Pac. R. Co. v. Bobo, 290 U. S. 499, 502, 503.

VI.

ARGUMENT.

No Substantial Evidence of Negligence or Proximate Cause.

(a) *Test of Liability under the Federal Employers' Liability Act.*

The sole claim of negligence is a violation of the Safety Appliance Act relating to automatic couplers. The Act prohibits the use of "any car * * * not equipped with couplers coupling automatically by impact * * * without the necessity of men going between the ends of cars." (27 Stat. 531, 45 U. S. C. A. Sec. 2.) Here there is no claim of a defective condition of the coupling apparatus. Specifically the claim is that the refrigerator car drawbar was not in line with the tender drawbar, necessitating Muldowney's presence between the car and tender to shift the car drawbar east to effect alignment before automatic coupling could be made.

When drawbars are sufficiently out of alignment so that, with one or both coupler knuckles open, the couplers will not couple automatically on impact, that is evidence justifying a jury finding that the couplers do not meet the requirements of the Safety Appliance Act. Under such circumstances, an employe injured, while necessarily between the cars to align the drawbars to effect automatic coupling, may recover as for a violation of the Act.

Chicago, R. I. & Pac. Ry. v. Brown, 229 U. S. 317,
San Antonio Ry. v. Wagner, 241 U. S. 476,
Atlantic City R. R. Co. v. Parker, 242 U. S. 56,
Hampton v. Des Moines & Cent. I. R. Co., 65 Fed. (2d) 899 (C. C. A. 8).

Violation of the Safety Appliance Act is one species of carrier negligence under the Federal Employers' Liability Act. Negligence and proximate cause must be established beyond speculation and conjecture by evidence which is substantial.

San Antonio Ry. v. Wagner, 241 U. S. 476, 484,
Chicago, M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472,
Toledo, St. L. & W. R. Co. v. Allen, 276 U. S. 165, 168, 169,
Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 339-344.

Whenever circumstantial evidence is relied on to prove a fact the circumstances must be proved by direct evidence and not themselves presumed. A verdict based on inferences from inferences, presumptions resting on other presumptions or mere speculation and conjecture, cannot stand.

United States v. Ross, 92 U. S. 281, 283, 284,
Manning v. Insurance Co., 100 U. S. 693, 697, 698,
Chicago, M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472, 477, 478,
Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 341-344.

Definitely and repeatedly the scintilla rule has been rejected by this court. Where the evidence is circumstantial

on an issue of negligence or proximate cause, and the inferences properly to be drawn from the proven facts or circumstances are more consistent or equally consistent with nonliability than with liability, the proof tends to establish neither, and judgment as a matter of law must go against the party upon whom rests the burden of proving liability.

Patton v. Texas & Pacific Ry. Co., 179 U. S. 658, 663, 664,

Chicago, M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472, 477, 478,

Gunning v. Cooley, 281 U. S. 90, 94, 95,

Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 341-344,

Ewing v. Goode, 78 Fed. 442, 444.

There is no direct evidence that, had Muldowney's body not intervened, the coupling would not have made automatically on impact, without the necessity of a prior shifting of the car drawbar by Muldowney, nor is there direct evidence that in fact he was so engaged or that he went between the car and tender for that purpose. Absent such direct evidence, it was incumbent on respondent to establish those facts by proof of circumstances which would justify the necessary inferences.

Under the foregoing controlling legal principles, respondent failed to adduce substantial evidence to justify a jury finding that petitioner violated the Safety Appliance Act, or that a violation of such Act proximately caused Muldowney's death. Consequently, the holding of the Circuit Court of Appeals is contrary to and in direct conflict with the cited decisions of this court and should be reversed.

(b) *No substantial evidence of violation of Safety Appliance Act.*

If there was a violation of the Safety Appliance Act, it did not result from a mechanical defect in the couplers, but arose, if at all, because the alignment of the drawbars did not permit automatic coupling on impact, unless a man went between the car and tender to shift the car drawbar. Under this theory what is the proof of violation of the Act?

There is no direct evidence that prior to the accident, the alignment of the drawbars would not permit automatic coupling on impact. Was there direct evidence of circumstances from which this fact could be inferred?

Both coupler knuckles were found closed after the accident. There is no direct evidence that one or both coupler knuckles were open before the accident. The circumstance that both knuckles were found closed after the accident, does not justify an inference that one or both were open at any prior time. The only proven circumstance which might justify an inference in this respect is the fact that, when the moving tender was eight to twelve feet from the car, Muldowney signaled the engineer to continue back to make the coupling. The logical inference from this circumstance is that the drawbars and couplers were then in position to effect automatic coupling. If both knuckles were open, a coupling usually will make even though the drawbars are not in direct line with each other. If it be assumed that the draw-bar alignment observed by Muldowney, as he approached the car and gave the signal, was the same as that found after the accident, then the natural inference to be drawn is that both knuckles were open and

hence Muldowney concluded the coupling would make, as it ordinarily did make under those circumstances. If, because of the signal, it be assumed that only one knuckle was open, then the logical inference to be drawn is that the drawbars were in alignment. It is apparent that Muldowney would not have given the signal unless he concluded that the drawbars and coupler knuckles were in position to effect coupling; otherwise he would and could have given a stop signal, or given no signal and stepped off the footboard to the west to await the result of the impact.

If the signal, as a circumstance to indicate the foregoing, is rejected, then there is no evidence one way or the other, except the fact that the knuckles were found closed after the accident. If, without regard to the evidence, we adopt speculation, then it is as logical to assume that both knuckles were open as to conclude that one only was open.

Under any of these theories, there is no substantial evidence to indicate that prior to the accident the coupling would not have made had Muldowney's body not intervened. The evidence leaves this issue in the realm of speculation and conjecture. The inference that the coupling would have made is as consistent, or more consistent, with the proven circumstances than the inference that it would not have made.

The location of Muldowney's body between the closed coupler knuckles is not a circumstance that justifies an inference that a drawbar adjustment was necessary or that he was attempting to effect one when injured. To so infer assumes a violation of the Act, without evidence in support, and then adopts the unsupported assumption to prove the violation and explain Muldowney's presence between

the couplers. Such an inference also is inconsistent with the undisputed fact, that, had a drawbar adjustment been necessary, Muldowney without leaving the footboard, could have made it by shifting the easily moved tender drawbar. His presence between the couplers is much more consistent with his slipping after stepping off the footboard to await the result of the impact or some purpose unrelated to the car drawbar alignment.

Because, later, Foreman Schupp may have stood in front of the car coupler to shift the car drawbar, does not justify an inference that Muldowney did likewise, or that there was necessity for a shifting of the car drawbar before the accident. Prior to his first attempt to couple, under circumstances much more favorable than those existing when Muldowney approached the car on the moving tender, Schupp did not discover any misalignment. It is pure speculation to conclude that Muldowney discovered a drawbar misalignment. The fact that, with the car and tender stationary and separated by twenty feet, Schupp stood in front of the car coupler and shifted the drawbar to the east, certainly has no tendency to prove that Muldowney would take a similar position in a space of less than twelve feet and in the path of the tender moving on his own signal. Such an inference is in direct conflict with the proven circumstance that, had a drawbar adjustment been necessary as Muldowney approached the car, he could have made it in safety by shifting, in either direction, the oiled and easily moved tender drawbar without stepping off the footboard.

The failure to couple after the accident, with only the car coupler knuckle open and the tender drawbar off center to the east, followed the impact between the 90 ton switch engine and tender, moving 2 to 3 miles per hour, and the

stationary 13½ ton car, with Muldowney's body between the closed coupler knuckles. As aptly stated by the Supreme Court of Minnesota in *Meisenhelder v. Byram,* 182 Minn. 615, 617, 233 N. W. 849, 850:

> "There is testimony of one witness that after the accident the cars did not automatically couple on the first attempt, a not unusual occurrence. *But at that time the coupler knuckles had suffered the impact in which the decedent's body was injured, and the reasonable inference is that one or both of the knuckles * * * had moved"* (Italics supplied).

To negative the natural inference, that the force of the impact would be likely to move drawbars, one of which was lubricated, that one man could shift by hand, respondent offered the opinion testimony of the witness Welton (ff. 108-113, pp. 80-83). He expressed the opinion that, if the drawbars were in line prior to the accident, the presence of Muldowney's body between the couplers would not cause the drawbars to be out of line after the accident. Why the tender drawbar was off center to the east after the accident is not explained.

That this opinion testimony was incompetent as proof of the fact of misalignment and contrary to natural laws and common sense, will be indicated by a consideration of the facts assumed and those ignored in the hypothetical question propounded. The question made no assumption respecting (1) whether the coupler knuckles were open or closed; (2) the position and posture of Muldowney and if, when struck by the tender coupler, he was struggling to escape injury; (3) the fact that his body was located to the east of the center of the car coupler; (4) the fact that the

tender coupler was off center to the east; (5) the weight of the car and of the moving tender. In addition the hypothetical question, contrary to the undisputed evidence that it was centered after the accident, assumed that the car drawbar was to the east of center.

These omitted and improperly included facts would have a direct bearing on the likelihood of the impact causing the drawbars to shift. The jury could not speculate and find that the opinion would have been the same if these material factors had been considered.

Where, as here, it clearly appears that the expert opinion, so-called, is pure speculation, and is opposed to physical laws, common knowledge and common sense, it will not be accepted as substantial evidence. *United States v. Hill,* 62 Fed. (2d) 1022, 1025, 1026 (C. C. A. 8).

(c) *No substantial evidence of proximate cause. Evidence leaves cause of death in realm of speculation and conjecture.*

Implicit in the verdict is a finding that, when crushed between the couplers, Muldowney was in the act of lifting the 350 pound car coupler drawbar east to align it with the off center tender drawbar. There is no direct evidence to sustain this finding, and, unless the circumstances proved by direct evidence justify inferences to that effect, there is no support in the evidence for the finding.

The following circumstances were established by direct evidence:

(1) That both coupler knuckles were found closed after the accident (f. 26, p. 19). There is no evidence that either was open prior to the accident.

(2) That when the moving tender was 8 to 12 feet from the refrigerator car Muldowney, from the tender footboard, signaled the engineer to continue back to make the coupling (ff. 132-137, pp. 96-100).

(3) That if drawbar alignment was necessary it could be, and customarily was made by shifting the easily moved tender drawbar without leaving the tender footboard (f. 246, p. 180; ff. 253, 254, p. 186).

(4) That with both knuckles open a coupling usually will make even when the drawbars are not in alignment (ff. 224-226, pp. 165, 166).

(5) That after the accident, when the car and engine were stationary and separated twenty feet, Foreman Schupp did not discover any misalignment but opened the car coupler knuckle and made one attempt to couple before moving the car drawbar. That when the coupling did not make on the first attempt after the accident, Foreman Schupp separated the car and tender twenty feet and may have stood in front of the car coupler to move the car drawbar east (ff. 88-92; pp. 65-68).

Manifestly if both coupler knuckles were closed before the accident Muldowney would not attempt to line the drawbars. In that situation, even if the drawbars were in direct line, a coupling could not be made.

As Muldowney approached the car on the footboard of the moving tender the tender headlight shown on the car and he held his lighted lantern. He knew the engineer was governed by his signals. When the moving tender was eight to twelve feet from the car he signaled the engineer that everything was in readiness to make the coupling and to continue back for that purpose. The only permissible inference from this proven circumstance is, that, before Muldowney gave this signal, he concluded that the drawbars were in line and that the coupling would make.

Otherwise we must assume that he would have given a stop signal and not a signal which he, as an experienced switchman, knew would advise the engineer that everything was in readiness to make the coupling and that the tender should continue backing for that purpose.

Certainly it will not be contended that a jury could infer that after he gave this signal, Muldowney discovered he was mistaken in his appraisal of the situation, and, when the moving tender was eight, six or two feet from the car, would step in front of the car coupler to attempt the hazardous and impossible task of lifting or shoving the 350 pound car drawbar east. Mere statement of this hypothesis should be sufficient refutation.

As stated heretofore, it is as logical to assume that both knuckles were open as it is to assume that one only was open. If both were open there is no evidence from which the jury could infer that the coupling would not have made, even based on the assumption that the drawbar alignment before was identical with that found after the accident.

Under respondent's theory Muldowney discovered the misalignment after he signaled the engineer and at a point ten, five or two feet from the car. He is presumed to have exercised due care for his own safety and not to have had a suicidal intent. Absent direct evidence respecting Muldowney's conduct, it is presumed that he did not act negligently (*Looney v. Metropolitan Railroad Co.*, 200 U. S. 480; *Miller v. Union Pac. R. Co.*, 290 U. S. 227). In fact, under the instructions of the trial court, to return a verdict for respondent, the jury was required to find that Muldowney exercised due care for his own safety (f. 282, p. 206).

In view of this presumption and the proven circumstances, what are the natural inferences respecting Muldowney's conduct if he did discover a misalignment after giving the last signal? Three safe ways of effecting alignment were available to him. He could have given a stop signal, separated the car and tender twenty feet, and shifted either drawbar. By a simple manipulation of the tender drawbar, in accordance with the customary practice, he could have aligned the drawbars, irrespective of the position of the car drawbar, without leaving the footboard. He could have stepped off the footboard to the west, awaited the result of the impact and, if the coupling did not make, separate the car and tank and, while they were stationary, make any adjustment found necessary, which was the method adopted by Schupp. Notwithstanding these logical and consistent inferences respecting normal conduct and due care, the jury, without supporting evidence, found that Muldowney, in utter disregard of its feasibility and his own safety, placed himself at a point and in a position that could only result in instant death. It is submitted that this conclusion could only be reached by speculating as to the cause of death.

Muldowney's presence between the couplers is much more consistent with an attempt to cross to the yard office and misjudgment as to the hazard, or slipping after stepping from the footboard for a purpose not connected with drawbar alignment. Such explanation of the cause of death is more consistent with the proven circumstances and does not convict him of gross negligence nor conflict with the finding implicit in the verdict that he exercised due care for his own safety.

If he went between the car and tender to open the car coupler knuckle by hand or for some purpose other than to shift the car drawbar, his death was due to his own act and there would be no company liability (*Great Northern Ry. v. Wiles,* 240 U. S. 444).

If the drawbar alignment before was the same as after the accident, then before the accident the car drawbar was centered and the tender drawbar was off center to the east. In that situation, the natural inference is that Muldowney, to effect alignment, would pull the easily moved tender drawbar west to place it in line with the centered car drawbar, rather than attempt the hazardous and impossible task of moving the car drawbar east.

The evidence leaves the cause of death in the realm of speculation and conjecture. Viewed in a light most favorable to respondent, the inferences from the proven facts and circumstances are more consistent with nonliability. Only by a disregard of the circumstances established by direct evidence, and drawing inferences from inferences and basing presumption on presumption, can a conclusion of liability be reached.

The action of the Circuit Court of Appeals in affirming a judgment based on a verdict so arrived at conflicts with the applicable and controlling decisions of this court.

Patton v. Texas & Pacific Ry. Co., 179 U. S. 658,
Chicago, M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472,
Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333.

In its opinion the Circuit Court of Appeals ignored and failed to mention the controlling decisions of this court. In support of its holding that the proven circumstances justified the inferences drawn by the jury, that Court re-

lied on *Lowden v. Burke,* 129 Fed. (2d) 767, (C. C. A. 8); *Geraghty v. Lehigh Valley R. Co.,* 70 Fed. (2d) 300, 83 Fed. (2d) 738, (C. C. A. 2), and *Williamson v. St. Louis-San Francisco Ry. Co.,* 74 S. W. (2d) 583, (Mo.), and stated that "the contention that the violation of the Safety Appliance Act was not the proximate cause of Muldowney's death need only be given passing notice" (p. 252, top) and then in passing fails to notice it at all. To the extent that the decisions cited by the Circuit Court of Appeals in its opinion conflict with the Patton, Coogan and Chamberlain decisions, they are not controlling. The doctrine of the Patton, Coogan and Chamberlain decisions has been followed and applied in many subsequent decisions of this court.

Atlantic Coast R. Co. v. Wimberley, 273 U. S. 673,
Gulf M. & N. R. Co. v. Wells, 275 U. S. 455,
Ft. Smith S. & R. I. R. Co. v. Moore, 276 U. S. 593,
Louisville & N. R. Co. v. Chatters, 279 U. S. 320, 332,
Northern Ry. Co. v. Page, 274 U. S. 65, 72,
Atchison, T. & S. F. Ry. Co. v. Toops, 281 U. S. 351, 354, 355,
Southern Ry. Co. v. Moore, 284 U. S. 581,
Atchison, T. & S. F. Ry. v. Saxon, 284 U. S. 458,
Southern Ry. Co. v. Walters, 284 U. S. 190, 194,
New York Cent. R. Co. v. Ambrose, 280 U. S. 486, 489, 490,
Northwestern Pac. R. Co. v. Bobo, 290 U. S. 499, 502, 503.

The Coogan decision involved an action under and a construction of the Federal Employers' Liability Act and definitely lays down the rule that where circumstantial

evidence is relied on to establish liability, (a) the circumstances themselves must be proved by *direct* evidence; (b) inferences can be drawn only from circumstances established by *direct* evidence; (c) inferences on inferences and presumptions on presumptions are not substantial evidence and (d) that a verdict based on speculation and conjecture cannot stand.

Verdicts based on sympathy, rather than substantial evidence, were criticized by this court in *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658, 664:

> "If the employe is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

In the case at bar it is apparent that the holding of the Circuit Court of Appeals departs from the settled rules of proof laid down by this court and should be reversed.

CONCLUSION.

It is respectfully submitted that, in view of the failure of the Circuit Court of Appeals to follow the doctrine of the Patton, Chamberlain and Coogan decisions, this case is one calling for the exercise by this court of its supervisory powers in order that justice may be done in this case and the conflict between the decision of the Circuit Court of Appeals for the Eighth Circuit and the applicable and controlling decisions of this court may be removed; and to such end a writ of certiorari should be granted and

this court should review the decision of the Circuit Court of Appeals for the Eighth Circuit and finally reverse it.

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INDEX

Cases Cited.

In the
Supreme Court of the United States

October Term, 1942
No. 590.

CHICAGO, ST. PAUL, MINNEAPOLIS and OMAHA RAILWAY COMPANY, a corporation, Petitioner,

vs.

AMELIA MULDOWNEY, as Special Administratrix of the Estate of HARRY MULDOWNEY, deceased, Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.
STATEMENT OF CASE

An application was made for a Writ of Certiorari by the petitioner, Chicago, St. Paul, Minneapolis and Omaha Railway Company, a corporation. Respondent presents this brief in opposition to the granting of said writ.

This action was originally commenced by Respondent as plaintiff in the United States District Court of Minnesota, Third Division, under the Federal Employer's Liability Act and is predicated under a violation by the petitioner railway company of the Federal Safety Appliance Act in that the Railway Company hauled and used

on its line a car and tender not equipped with couplers coupling automatic on impact and as a proximate result thereof decedent met his death.

At the time of the accident resulting in the death of Harry Muldowney, both he and defendant were admittedly engaged in interstate commerce and transportation. The jury returned a verdict in favor of respondent. Petitioner's motion to set aside the verdict and judgment and for judgment in its favor or for a new trial were denied. Petitioner then appealed to the United States Circuit Court of Appeals for the Eighth Circuit, which Court affirmed the judgment of the District Court. Petitioner's petition for a re-hearing was denied.

II.

STATEMENT OF FACTS

Harry Muldowney had been in the employ of the petitioner-railroad for twenty years in the capacity of a switchman. At the time of his death he was 50 years of age and left surviving him his widow, Amelia Mudowney, age 44 years, and three children, ages 20, 22 and 25. (f. 116, p. 86). He died as a result of injuries sustained by him while in the employ of petitioner-railroad company at its Sioux City, Iowa yard on the morning of March 6, 1941. Train #41 arrived at the 22nd Street Station in the Sioux City, Iowa yard of the petitioner railroad company from Omaha, Nebraska, in the early morning of March 6, 1941. Muldowney was a member of a switch crew employed by petitioner railroad company which was engaged in breaking up the freight train which had just arrived.

After the arrival of the train and before the accident, the only inspection made was a running inspection made

by two of appellant's inspectors who walked along the train on each side from the caboose forward for the purpose of finding "out if possible anything is loose, broken, or dragging along the train from the bolts to the wheels." (f. 176, p. 129).

After such inspection the switching crew took out one cut of cars for switching purposes and then took out a second cut of cars, including the Swift Refrigerator Car No. 18589 (hereinafter referred to as the Swift car), which was involved in the accident. After this second switching operation the Swift car together with three other cars was "kicked" back to the train so that the Swift car was standing on the southerly end of the remaining portion of the train on the North bound main line track, about 20 feet south of the yard office and it so remained after the accident. (f. 53, p. 38). Muldowney was the member of the switch crew who was following the engine and coupled and uncoupled the cars which were to be switched. Muldowney was standing on the Northwest footboard of the tender of the switch engine when the switch engine started to back northerly on the main line track for the purpose of coupling on to the refrigerator car. As the engine was backing toward the Swift car, Foreman Schupp was standing west of the north bound track and approximately 205 feet south of the south end of the refrigerator car. (f. 78, p. 58). Yardmaster Stickles was 20 feet south and 20 feet west of the south end of the Swift car (f. 18, p. 14). Engineer Larson and Fireman Hubble were riding in the switch engine.

The engine was backing at a rate of ten to twelve miles per hour until it reached a point about three car lengths to the south end of the Swift car. It was the

engineer's contention that at a point about three car lengths from the south end of the Swift car the engine was shut off and drifted back, gradually slowing down until it was going two or three miles an hour about eight or ten feet before the accident.

None of the witnesses saw the accident. The first one to suspect something was wrong was Yardmaster Stickles who was standing 20 feet from the south end of the refrigerator car. When he thought it was about time for the engineer to start ahead and the engine did not start, he turned around and observed Muldowney's lighted lantern on the ground between the rails. He ran over and found Muldowney standing upright, between the coupler of the switch engine and the coupler of the Swift refrigerator car (f. 25, p. 19), facing the refrigerator car.

On observing Muldowney between the drawbars, Yardmaster Stickles called to the engineer to move ahead and the engine was moved ahead 20 feet. Foreman Schupp heard the Yardmaster holler to the engineer to slack ahead and immediately ran from where he was standing to the place of the accident. (f. 81, p. 60). From the time the switch engine passed Foreman Schupp, going between 10 and 12 miles per hour (a distance of 205 feet from the accident), until he heard the call of Yardmaster Stickles, two minutes had elapsed. (f. 85, p. 63). After the switch engine had been moved ahead, Yardmaster Stickles took hold of Muldowney and laid him down in the tracks with his feet facing north and his head south. Muldowney moaned but did not talk. An ambulance was called and he was sent to the hospital but died before the doctor reached the hospital. (f. 104, p. 77). After Muldowney was taken to the hospital and within 20 minutes from

the time of the accident, the crew proceeded with the switching operation. The engine was still standing on the same spot, 20 feet South of the Swift car. It had not been moved. (f. 29, p. 22). The knuckle on the Swift car was opened by Schupp. The switch engine backed up for the purpose of coupling onto the Swift car but the coupling did not make. The drawbars on the switch engine and the Swift car were out of alignment to such an extent that a coupling could not be made without an adjustment of the drawbars. (f. 34, p. 25; f. 36, p. 27; f. 92, p. 68; f. 142, p. 104). After the first coupling did not make, Schupp slacked the engine ahead and opened the knuckles on both the Swift car and the switch engine and adjusted the drawbar on the Swift car, in the following manner:

> "Q. And did you get in the middle of it and lift it over to the * * *?
>
> A. I got under the drawbar and lifted it over.
>
> Q. That is right in the center of the drawbar, is that correct?
>
> A. Yes, under there, in the center of the knuckle." (f. 91, p. 67).

After Schupp had adjusted the drawbar on the Swift car the cars coupled automatically. (ff. 33-4, pp. 24-5) (f. 36, p. 27, ff. 90-1, pp. 66-7).

If couplers are lined up correctly they will couple automatically. If they are not lined up correctly it is necessary to adjust them. (ff. 93-4, pp. 69). If the drawbars are out of line the knuckles would hit and close and the coupling would not make. (f. 37, p. 27). When a drawbar is off center it is the usual custom and practice for the brakeman to step between the cars and push or pull the drawbar over with his hands. In the instant case, it was the duty of Muldowney to see that the cars

were properly coupled and if there was an adjustment to be made in the drawbar, it was his duty to make it. (ff. 93-4, pp. 68-9). Normally a coupler has a play of three inches, an inch and a half on each side of the shank, to enable trains to go around curves and to make couplings on curves. (ff. 206-7, p. 152). There being a maximum required play of one and one-half inches on each side, if a coupling on one car is an inch and a half to the east and a coupling on another car is an inch and a half to the west, the coupling would make. (ff. 213-4, p. 157), but if a coupling is out of alignment beyond this maximum play the coupling will not make automatically even though both knuckles are open. There is no device for adjusting the drawbars without going between the cars. They cannot be adjusted by use of the pin lifter.

A knuckle of a coupler works very easily, and may be closed with the fingers. (f. 264, pp. 193-4). An expert witness for Respondent who had 30 years experience as switchman and trainman working for the Omaha Railroad, the Minneapolis and St. Louis, Great Northern, Soo Line and Northern Pacific, who had operated couplers for many years and was familiar with coupling devices, testified that in his opinion the presence of Muldowney's body between the drawbars could not have forced the drawbars out of line (ff. 108-9, pp. 80-1) and the presence of his body between the couplers under the circumstances could cause the coupler knuckles to close. He further said: "I have seen several men in my time caught in that same predicament and we would always find the knuckles closed." (ff. 268-9, pp. 196-7).

THE ISSUES SUBMITTED TO THE JURY

The issues submitted to the jury was whether at the time of the accident petitioner violated the Safety Appliance Act, viz, whether the car and tender were equipped with couplers, coupling automatically by impact and if not, whether such failure was the proximate cause of Muldowney's death. The jury by its verdict determined the issues submitted in favor of the Respondent.

III.

SUMMARY OF ARGUMENT

There was substantial evidence from which the jury could find a violation of the Safety Appliance Act relating to automatic couplers and that said violation was the proximate cause of Muldowney's death.

(A.) Rule of liability under the Federal Safety Appliance Act.

Delk v. St. Louis S. F. R. Co., 220 U. S. 580;
San Antonio Railroad Co. v. Wagner, 241 U. S. 476;
Atlantic City R. C. v. Parker, 242 U. S. 56;
Chicago R. I. Pac. Ry. Co. v. Brown, 229 U. S. 317.

(B.) The record abundantly establishes that the drawbars were out of line to such an extent that it was necessary for Muldowney to go between the cars to adjust them before a coupling could be made.

(C.) The verdict of the jury was based upon reasonable inference and not upon speculation and conjecture.

Geraghty v. Lehigh Valley R. Co., 70 Fed. (2d) 200; Second Circuit;

Williamson v. St. Louis S. F. R. Co., 74 S. W. (2d) 583, 335 Mo. 917.

(D.) The decisions of the Circuit Court of Appeals is not in conflict with applicable decisions of this Court.

Mpls. & St. Louis R. Co. v. Gotschal, 244 U. S. 66;
San Antonio & A.P.R. Co. v. Wagner, 241 U. S. 476;
Atlantic City R. Co. v. Parker, 242 U. S. 56.

(E.) Circumstantial evidence is sufficient to establish liability.

New York Central R. Co. v. Marcone, 281 U. S. 345;
Choctaw O. & G. R. Co. v. McDade, 191 U. S. 65;
Chicago, St. Paul, Mpls. & Omaha R. Co. v. Kulp, (8th Cir.); First Appeal, 88 Fed. (2d) 466; Second Appeal, 102 Fed. (2d) 352;
Burke, etc. v. Lowden, et al, 129 Fed. (2d) 767.

(F.) There was no reversible error in the admission of opinion testimony of respondent's witness, Welton.

San Antonio R. Co. v. Wagner, 241 U. S. 476;
Hampton v. Des Moines and Central I. R. Co., 65 Fed. (2) 899.

IV.

ARGUMENT

There was substantial evidence from which the jury could find a violation of the Safety Appliance Act relating to automatic couplers and that said violation was the proximate cause of Muldowney's death.

(A.) Rule of Liability under the Federal Safety Appliance Act.

There is imposed upon interstate carriers by the Safety Appliance Act an absolute duty to provide every car used in moving interstate traffic with an automatic coupler, and to maintain them in proper condition at all

times and under all circumstances. This duty is not discharged by properly equipping the car with automatic couplers and using due diligence to keep them in good working order.

Delk v. St. Louis S. F. R. Co., 220 U. S. 580.

If a car is not equipped with couplers coupling automatically by impact without the necessity of an employee going between the ends of the cars and by reason of this and as a proximate result of it the employee is injured, the railroad is liable. If the Safety Appliance Act is violated the question of negligence in the general sense of want of care is immaterial. A violation of the Safety Appliance Act is negligence per se. Any misconduct on the employee's part is no more than contributory negligence which is excluded from consideration in a case such as this.

San Antonio & A.P.R. Co. v. Wagner, 241 U. S. 476;

The drawbar is an integral part of the automatic coupling apparatus required by the Safety Appliance Act, and the use of the car with a defective drawbar, or with a drawbar out of line to such an extent as to necessitate an employee going between the cars to align it in making a coupling, is a violation of the Act. The test of compliance with requirements of the law is the operating efficiency of appliances with which the cars are equipped.

San Antonio & A.P.R. Co. v. Wagner, 241 U. S. 476;
Atlantic City R. Co. v. Parker, 242 U. S. 56;
Chicago R. I. Pac. Ry. Co. v. Brown, 229 U. S. 317.

(B.) The record abundantly establishes the fact that the drawbars were out of line to such an extent

that it was necessary for Muldowney to go between the cars to adjust them before a coupling could be made.

It is an admitted fact that immediately after the accident the drawbars on both the engine and the Swift car were out of line to such an extent that a coupling could not be made without an adjustment. After Muldowney was removed, Foreman Schupp opened the knuckle on the Swift car, and an attempt to couple with the engine was made. The coupling did not make. Schupp then slacked the engine ahead and opened both the knuckle on the engine and the Swift car and in addition got in the middle of the knuckle on the Swift car and lifted it over. Thereafter, the coupling made. Welton, an expert of thirty years of experience as a switchman and trainman, who had observed several men in that "same predicament" said that the presence of a man's body between the drawbars would not force them out of line. There was, therefore, competent evidence which would warrant the jury in concluding, and it did so conclude, that the drawbars were out of line prior to the accident to such an extent that a coupling could not be made.

Schupp's conduct is most significant. After the first coupling had been attempted, he not only opened both knuckles, but, in addition thereto, he lifted the drawbar on the Swift car to the east. As an experienced switchman, he knew that even with both knuckles open the coupling could not be made unless he made this additional adjustment. His experience taught him to do the very thing he did in the situation that confronted him. He knew that if couplers are lined up correctly they will couple automatically and if they are not lined up correctly it is necessary to adjust them. He knew that the usual custom and practice when couplings are out of

alignment is for the brakeman to step between the cars and push or pull the drawbars over with his hands. In the instant case, he did not push or pull the drawbar over; but he got under it and lifted it over. If there had been nothing wrong with the coupler, he could have pushed or pulled it over. Under the evidence in this case, when a drawbar cannot be pushed or pulled over, it means either that it is "rusty" or that there is something wrong underneath. In the light of this testimony, the fact that Schupp found it necessary to lift the drawbar over warranted the jury in concluding that there was something wrong with the drawbar.

(C.) The verdict of the jury was based upon reasonable inference and not upon speculation and conjecture.

It is settled law that if, before the accident, the drawbars were out of line and Muldowney necessarily went between the cars to align them, the jury was warranted in returning a verdict for the respondent.

Respondent offered direct evidence that immediately after the accident the drawbars were out of line to such an extent that a coupling could not be made without an adjustment. The foreman of the switch crew opened the knuckle of the coupler on the refrigerator car following which the switch engine attempted to couple onto the refrigerator car, but the coupling did not make with the first impact. It was necessary to make an adjustment before the coupling could be made. (f. 92, p. 68).

Respondent offered further direct evidence of the fact that Muldowney was caught between the drawbars of the refrigerator car in front of the coupler and in the position he would be if he was in the act of adjusting the drawbar by moving it to the center. Schupp, his immediate superior, took the same position when im-

mediately after the accident he found the drawbar so out of line that it would not couple and it was necessary for him to adjust it by pulling it over to the center.

From the substantive evidence offered by the plaintiff, the jury could readily draw the inference that plaintiff's intestate was in the act of adjusting the coupling; that the coupling could not be made; that as the engine approached the refrigerator car with Muldowney standing on the northwest footboard, Muldowney thought it necessary to go between the cars to make the adjustment. Muldowney was a switchman with twenty years' experience. It was his duty to adjust the drawbar. He had been engaged in switching operations for many years. There is no other reasonable inference but that he could see that the coupling could not be made by impact in view of the misalignment of the drawbars unless he went between the cars and aligned them. These inferences could readily have been drawn by the jury. As a matter of fact, we cannot see how they could have drawn any other inference in a death case.

Verdicts for plaintiffs in death cases where the facts were similar have been sustained.

Geraghty v. Lehigh Valley R. Co., 70 Fed. (2d) 300; Second Circuit;

Williamson v. St. Louis S. F. Ry. Co., 74 S. W. (2d) 583; 335 (Mo.) 917.

(D.) The decision of the Circuit Court of Appeals is not in conflict with applicable decisions of this court.

Petitioner cites and relies on the Patton, Looney, Saxon, Chamberlain, Ambrose, Coogan, Babo, Toops and other cases which set forth the proposition of law that a verdict cannot be sustained on mere speculation and

conjecture. None of these cases relate to the Federal Safety Appliance Act involved in this case, and the facts in the cases cited by petitioner are not in any respect similar to the facts in the case at bar.

In a situation such as this, these cases are not controlling in view of the positive duty imposed by the Statute upon the railroad to furnish safe appliances for the coupling of cars.

Mpls. St. Louis R. Co. v. Gotschal, 244 U. S. 66.

The rule of law contended for by petitioner here is not applicable in this case where the verdict of the jury is based upon reasonable inference and the jury's right to infer from the direct substantive evidence offered by plaintiff that drawbars were out of line as the engine upon which Muldowney was riding approached the car and that it was necessary for Muldowney to go between the cars to adjust them, otherwise, a coupling could not have been made, is supported by the ruling of the Supreme Court of the United States in **Atlantic City R. R. Co. v. Parker,** 242 U. S. 56, where it was held that the jury may infer a statutory defect if there is evidence that the required automatic coupling did not occur because there was too much lateral play in the drawbars.

(E.) Circumstantial evidence is sufficient to establish liability.

The facts and circumstances in the case at bar were amply sufficient, we contend, to warrant the finding of the jury that the railroad company violated the provisions of the Safety Appliance Act. Direct proof or eye witnesses are not indispensable. Circumstantial evidence is sufficient to establish liability. This is even true in cases under the Federal Employers' Liability Act where

safety appliances are not involved and plaintiff does not have the benefit of the law which imposes upon the railroad an absolute duty to furnish safe appliances.

New York Central R. Co. v. Marcone, 281 U. S. 345;
Choctaw O. & G. R. Co. v. McDade, 191 U. S. 65;
Chicago, St. Paul, Mpls. & Omaha R. Co. v. Kulp, (8th Cir.) First Appeal, 88 Fed. (2d) 466; Second Appeal, 102 Fed. (2d) 352;
Burke, etc. v. Lowden, et al, 129 Fed. (2d) 767.

Petitioner in its brief, page 17, presents the argument that: "There is no direct evidence that, had Muldowney's body not intervened, the coupling would not have made automatically on impact, without the necessity of a prior shifting of the car drawbar by Muldowney, nor is there direct evidence that in fact he was so engaged or that he went between the car and tender for that purpose." There is direct evidence of the fact that after the accident both drawbars were found out of line to such an extent that a coupling failed to make. It was Muldowney's duty to adjust drawbars if they needed adjustment. An adjustment could not be effected without going between the cars. The drawbar could not be adjusted by use of the hand lever. The jury did not have to speculate to determine that Muldowney with 20 years' switching experience, ascertained as the engine on which he was riding approached the refrigerator car that the coupling could not be made due to the misalignment of the drawbars, and having inferred this, it meant that the railroad company violated the provisions of the Safety Appliance Act, the proximate result of which violation resulted in his death.

(F.) There was no reversible error in the admission of opinion testimony of Respondent's witness, Welton.

A witness with many years practical experience, well qualified to express an opinion, testified that the presence of Muldowney's body between the drawbars could not have forced the drawbars out of line and that under the circumstances the impact of the switch engine against a man's body between the couplers would cause the coupler knuckles to close if they were open. As pointed out by the Circuit Court of Appeals in its opinion, proper foundation was laid for this testimony. Opinions expressed by railroad men in railroad service having practical experience in the operations involved in the case before the court and jury are proper for the consideration of the jury. The weight and credibility of the testimony was for the jury.

San Antonio R. Co. v. Wagner, 241 U. S. 476;

Hampton v. Des Moines & Central I. R. Co., 65 Fed. (2d) 899.

V.

CONCLUSION

Considering that plaintiffs' action is predicated upon the Safety Appliance Act which imposes upon the petitioner railroad company the absolute duty to provide its cars with couplers which at all times are in an efficient operating condition, and with the proof which was before the jury in this case, we submit that the jury could not have reasonably drawn any other conclusion than that the railroad here violated the provisions of the Safety Appliance Act proximately causing the death of respondent's intestate.

We contend that the verdict of the jury and the decisions of the Circuit Court of Appeals should be affirmed. The issues in the case presented fact questions for the jury. No construction of Federal Statute is involved and no undetermined principal of law or practice is involved. The petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, A. D. 1942

No. 590

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, a Corporation,

Petitioner,

vs.

AMELIA MULDOWNEY, as Special Administratrix, of the Estate of HARRY MULDOWNEY, Deceased,

Respondent.

PETITIONER'S REPLY BRIEF.

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SUBJECT INDEX.

TABLE OF CASES.

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PETITIONER'S REPLY BRIEF.

Respondent evades the specific points urged in Petitioner's brief. To avoid misconception respecting the errors which require certiorari, a short reply brief is necessary.

I.

Material and Controlling Facts Ignored.

In Respondent's brief, and in the opinion of the Circuit Court of Appeals, no mention is made of these controlling

facts (established by undisputed direct evidence): (a) that when the engine tender, traveling 2 to 3 miles per hour, was 8 to 12 feet from the refrigerator car, Muldowney, then standing on the tender footboard, gave the engineer a lantern signal which indicated that everything was in readiness to make the coupling, and that the tender should continue moving back for that purpose (R. ff. 132-137, pp. 96-100); and (b) that had a drawbar adjustment been necessary at that time Muldowney could have made it without leaving the footboard, merely by shifting the oiled and easily moved tender drawbar (R. ff. 246, p. 180; f. 250, p. 183; ff. 253, 254, p. 186).

A jury finding that, after he gave the signal, Muldowney discovered a drawbar misalignment and placed himself in the path of the tender moving pursuant to *his* specific signal to effect alignment by attempting to move the 300-pound car drawbar, is inconsistent with these proven circumstances, contrary to the presumption of due care, and is based on mere speculation.

II.

Burden On Respondent to Establish Violation of Safety Appliance Act as Proximate Cause of Death.

The applicable and controlling decisions of this Court hold (1) that whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved by direct evidence and not themselves presumed, (2) that a verdict may not be based on inferences from inferences, presumptions resting on other presumptions, or mere speculation and conjecture, and (3) that where the inferences properly to be drawn from the proven facts or circumstances are

more consistent, or equally consistent, with non-liability than with liability, the proof tends to establish neither, and judgment as a matter of law must go against the party upon whom rests the burden of proving liability. *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658, 663, 664; *Chicago, M. & St. P. RR. v. Coogan*, 271 U. S. 472, 477, 478; and *Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333, 341-344. Respondent attempts to escape the force of these controlling rules by advancing the contention, that because here negligence is based on a violation of the Safety Appliance Act, the evidence necessary to discharge the burden of proof need not meet the test that is applicable when common law negligence only is relied on to establish liability (Respondent's brief, pp. 12, 13). Respondent's contention must be rejected.

A Safety Appliance Act violation is merely one species of carrier negligence under the Federal Employers' Liability Act. *San Antonio Ry. v. Wagner*, 241 U. S. 476, 484. Consequently the violation as a proximate cause of death must be established beyond speculation and conjecture by evidence which is substantial (*Chicago, M. & St. P. RR. Co. v. Coogan*, 271 U. S. 472; *Pennsylvania R. Co. v. Chamberlain*, 288 U. S. 333).

III.

Circuit Court of Appeals Disregards This Court's Controlling Decisions.

The Circuit Court of Appeals consistently has declined to follow *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658, *Chicago, M. & St. P. RR. Co. v. Coogan*, 271 U. S. 472, and

Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, and has adopted its own views with respect to the degree of proof required to establish liability under the Federal Employers' Liability Act. *Chicago, St. Paul, Mpls. & Omaha R. Co. v. Kulp,* 88 Fed. (2d) 466, 102 Fed. (2d) 252; *Burke v. Lowden,* 129 Fed. (2d) 767; *Chicago, St. Paul, Mpls. & Omaha Ry. Co. v. Muldowney,* 130 Fed. (2d) 971 (decision in case at bar). In each case the Circuit Court of Appeals affirmed a judgment for plaintiff entered on a jury verdict which was based on inferences from inferences, presumptions resting on other presumptions, and speculation and conjecture, and where the proof was more consistent or equally consistent with non-liability.

So long as this Court declines to review these and similar decisions, (a) litigants in the Eighth Circuit will be deprived of a fair trial of actions under the Federal Employers' Liability Act; (b) the decisions of this Court in the Patton, Coogan and Chamberlain cases will be disregarded; and (c) the decisions of the Circuit Court of Appeals for the Eighth Circuit will be in conflict with the applicable law as laid down by this Court.

In support of the holding on proximate cause, the Circuit Court of Appeals cited *Geraghty v. Lehigh Valley R. Co.,* 70 Fed. (2d) 300. Neither that court nor respondent in her brief refers to the fact that the final decision in the Geraghty case (83 Fed. (2d) 738), reversed the trial court on the ground that the cause of action was not governed by the provisions of the Federal Employers' Liability Act, and that the State Compensation Act controlled.

In view of the disinclination of the Circuit Court of Appeals for the Eighth Circuit to follow and apply the doctrine of the Patton, Coogan and Chamberlain decisions, this Court, for the protection of litigants and the guidance

of that Court, should review by certiorari the judgment in the case at bar.

Respectfully submitted,

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